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BY HAND DELIVERY

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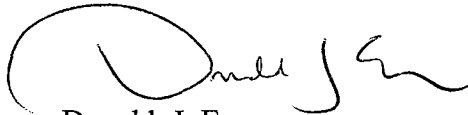
Re: Docket 03-66
Comments of Independent MMDS Licensee Coalition

Dear Ms. Dortch:

Transmitted herewith is a revised version of the Comments filed by the Independent MMDS Licensee Coalition on January 10, 2005. The revised version corrects certain typographical errors on page 3.

Please contact the undersigned should there be any questions regarding this matter.

Respectfully submitted,



Donald J. Evans
Counsel for Independent MMDS Licensee Coalition

DJE:deb

Enclosure

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of)	RM-10586
Fixed and Mobile Broadband Access, Educational)	
and Other Advanced Services in the 2150-2162)	
and 2500-2690 MHz Bands)	
)	
Part 1 of the Commission's Rules – Further)	WT Docket No. 03-67
Competitive Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service and the)	
Instructional Television Fixed Service)	
Amendment of Parts 21 and 74 to Engage in Fixed)	
Two-Way Transmissions)	
)	
Amendment of Parts 21 and 74)	WT Docket No. 02-68
of the Commission's Rules with Regard to)	RM-9718
Licensing in the Multipoint)	
Distribution Service and in the)	
Instruction Television Fixed Service for the)	
Gulf of Mexico)	

To: The Commission

COMMENTS OF INDEPENDENT MMDS LICENSEE COALITION

The Independent MMDS Licensee Coalition ("IMLC") hereby submits these Comments in connection with the *Further Notice of Proposed Rulemaking in this Docket*.¹

IMLC is an *ad hoc* group of independent MDS and MMDS licensees who will be affected by the rules ultimately adopted. It participated actively in the earlier phase of this proceeding and is pleased to offer its perspectives on two of the remaining issues before the Commission.

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provisions of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd. 14165 (2004).

I. Auction Structure

The Commission proposes auctions as a novel method of allocating both unassigned and presently licensed spectrum. We offer no comment on the auction of the vacant spectrum since that process will follow relatively well established patterns. Presently assigned spectrum could be auctioned under two scenarios: (i) when a market is not transitioned in the first three years of the new rules or, (ii) in markets that *are* transitioned, when licensed incumbents choose not to participate in the transition process. The object in either case is to encourage the incumbents to clear the band in a way that is fair to all.²

A. Valuation method. At Para. 306 of the *FNPRM*, the Commission discussed its plan to base valuations on “the auction for new licenses in this band,” as though an auction for vacant spectrum would be conducted and completed before the auction for occupied spectrum begins. However, later in that paragraph the Commission indicated that bidders would be advised of projected bidding offsets “based on winning bids in the most recent round.” The latter language seems to imply that bidding credits would somehow be assigned in the course of the auction itself based on floating high bids from earlier rounds. If that is indeed what the Commission intended to propose, it should not be adopted. It is critical for auction participants to know what credits they would have available to bid before an auction begins, not to learn on a round-by-round basis what credits they are “projected” to have. No one could intelligently plan on so uncertain a basis.

That leaves the option of having a pre-auction of vacant spectrum as a possible method of valuing the bidding credits for occupied spectrum. IMLC feels that using an auction of

² We assume in the following discussion that auctions will be conducted on a BTA basis rather than MEAs. IMLC has proposed that licenses be issued on a BTA basis in a petition for reconsideration filed today.

vacant spectrum as the basis for assigning bidding credits for occupied spectrum would result in a seriously distorted projection of the value of the commercial BRS component of occupied spectrum. In most cases, unoccupied spectrum is unoccupied because it has been deemed of less value over the years by prospective users. Moreover, the only vacant commercial spectrum will be MDS spectrum where the auction winner defaulted on installment payments. The vast majority of vacant spectrum will be ITFS spectrum which only non-commercial educators are eligible to bid on. Educators cannot be expected to bid the full commercial value of this spectrum. In addition, because such an auction of unoccupied spectrum would likely occur before the transition process is well advanced, it likely will reflect historical values rather than the forward-looking values that would manifest the far greater potential of a fully transitioned 2.5 GHz band. In short, the values established by an auction of unoccupied spectrum will bear little practical or useful relationship to the anticipated values of occupied commercial spectrum some two or three years down the road. Accordingly, while reliance on an auction of unoccupied spectrum has facial appeal based as it will be on actual market prices,³ the comparison of these values to occupied commercial spectrum is plainly an apples/oranges exercise. The proposal to assign bidding credits on this basis should therefore not be adopted.

A much better paradigm is to treat the 2.5 GHz band, as soon to be modified, as an extension of PCS capabilities. The 2.5 GHz band had similar propagation characteristics to current PCS spectrum. It can now be employed for PCS-like mobile applications. In addition,

³ IMLC spent quite some time attempting to develop a formula for adjusting the results of the vacant spectrum in such a way that it would more nearly reflect the values of the licenses for which bidding credits would be issued. We ultimately concluded that the adjustment process involved so many elements of appraisal and estimation that the merit of relying on vacant channel auction values as a baseline was almost entirely lost.

the 2.5 GHz band will have significant broadband capabilities over and above PCS. The Commission should therefore apply similar principles to establishing the bidding credits for the 2.5 GHz band as the Commission applies to establishing minimum bids in PCS auctions.

In the most proximate PCS auction scheduled to begin later this month (Auction 58), the Commission applied a series of factors to arrive at minimum opening bids for each license.⁴ These included a number of factors which required the Bureau to exercise judgment about projected values: levels of incumbency, availability of technology, extent of interference with other bands, etc. After getting input from the public, the Bureau was able to set minimum bid levels of \$.50 per MHz per pop for large markets (over 2 million people), \$.25 per MHz/pop for markets between 2 million and 500,000, and \$.15 per MHz/pop for smaller markets. Looking forward, these values more nearly approximate the likely values of commercial (BRS) spectrum. In fact, because the potential of BRS/EBS use in 3G applications is higher than PCS, these minimum PCS opening bids are extremely conservative reflections of BRS values. The Commission should therefore adopt a process in assigning BRS bidding credits similar to the process it uses in developing minimum PCS bids. The result would be MHz/pop prices tiered to correctly reflect the higher value of BRS spectrum in larger markets.

B. Fail safe mechanism. Because no bidding credit mechanism will be precisely perfect, IMLC believes there should be a fail safe back-up to ensure that licensees will not involuntarily lose their licenses. The Commission's proposal seemed to contemplate that the bidding credit system would always leave licensees in a position to bid for and win their own licenses with the allotted bidding credits. To guard against minor imperfections in the system,

⁴ *Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 58*, DA 04-3005, rel. Sept. 16, 2004.

however, licensees bidding on their own license should automatically be allotted enough extra bidding credits to retain their license even if the bidding credit arrived at through the process outlined above fell short.

C. Alienability of bidding credits. The Commission proposed that bidding credits assigned to incumbents be alienable and divisible. IMLC strongly supports that proposal. By commodifying these rights to the greatest extent possible, the Commission ensures that the market will drive the usage of the credits. In addition, it may be that the credits will be more useful to other potential bidders than to the original holders. In those circumstances, it makes sense to put the credits in the hands of those who need them the most.

D. Allowing opt-outs in transitioned markets. There may be instances where some incumbents in transitioned markets are unable to reach agreement with the transition proponent on how the transition should occur, or it may be that the transition effectively destroys the business plan under which the incumbent had been operating or planning to operate. IMLC therefore supports the Commission's proposal to permit such incumbents to go into the auction process outlined above. Non-participating incumbents could effectively be cleared out of the band in this way. To accomplish this, however, licensees in this category would not be assigned the automatic extra credits needed to keep their license. Instead, they would be able to keep or bid the credits allotted to their license under the normal allotment system and, if outbid, would receive the difference between their bidding credit and the high bid in cash.

II. Renewal Standards

A second area of concern to all incumbents is clarifying what standards for use of the spectrum will warrant a renewal expectancy in 2011 when these licenses next are renewed. The standard adopted must reflect that the industry has been in regulatory stasis since 2001,

that, in consequence, it has been impossible for licensees to make effective use of the spectrum, and that it will remain so until the transition process is complete in three or more years. In the LMDS and 39 GHz contexts, the Commission has established a relatively generous “safe harbor” of one link per 250,000 pops.⁵ The contemplated uses of BRS/EBS make application of such a straightforward standard problematic since in many cases spectrum will be used as part of a consolidated spectrum mélange of different licensees and even different services. It may be unclear when particular bits of spectrum are being used or even when they are being held in reserve or as guard bands.

We therefore suggest four separate touchstones for BRS/EBS renewal expectancy:

1. If a licensee has provided service for 20% of its license term, it would be entitled to an expectancy.
2. If a licensee has entered into a spectrum lease with an unaffiliated entity for 20% of its license term, it would be entitled to an expectancy.
3. If a licensee has provided service to one link per 250,000 population, it would be entitled to an expectancy.
4. If a licensee at the 10-year mark has constructed facilities providing coverage to 20% of the population of its potential service area, it would be entitled to an expectancy.

We emphasize that these are only safe harbors; they are not exclusive measurer of performance. The overriding standard would still be “substantial service,” which a licensee could demonstrate or evince by other methods peculiar to its own operations.

We also emphasize that the standard must apply proportionally to licensees who have not held their licenses for the full ten year license term. (E.g., a licensee whose license was

⁵ *In the Matter of Establishing Rules and Policies for Local Multipoint distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 12545 (1997).

granted in 2004 would only have to show provision of service for 20% of 7 years.) In addition, the standard will have to account for the limbo the industry has been in since the beginning of this decade and the anticipated continuing stasis while the transition process takes place. This particular decade has been a uniquely jumbled, uncertain and inconstant license period which has severely and adversely impacted the ability of licensees to provide service. To account for this unusual circumstance, during the present 2001-2011 renewal cycle only, the standards enumerated above would be halved. (E.g., a licensee who provided service during ten percent of its 2001-2011 license term would be entitled to a renewal expectancy.)

III. Conclusion

IMLC respectfully urges the Commission to bring this Further Rulemaking to a very swift conclusion so that the process of initiating transitions and delivering needed service to the American people can begin as soon as possible.

Respectfully submitted,

Independent MMDS Licensee Coalition

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January 10, 2004